Supreme Court, U.S.
FILED
041613 MAY 27 2005
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No. _____

In the Supreme Court of the United States

IN RE: $22,161.00 UNITED STATES CURRENCY
SEIZED FROM KENNETH MUTHAMA [GREGORY SMITH]
Petitioner,

v.

THE STATE OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower Courts and the Hamilton County Prosecutors violated Ohio Revised Code, Section 2925.43, "Civil Forfeiture Action Prior to Prosecution" as written, thereby violating the Due Process Rights of Petitioner, Gregory Smith.

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Smith. Respondents are The State of Ohio and the Hamilton County Prosecutor's Office, Hamilton County, Ohio.

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OPINIONS BELOW

The Opinion of the Hamilton County Judge Magistrate decided May 27, 2003, Unreported, Opinion of Hamilton County Common Pleas Court, Decided September 18th, 2003, Unreported, Opinion of the First District Court of Appeals, Hamilton County, Ohio, Decided July 7th, 2004, the Supreme Court of Ohio, Entry Denying Jurisdiction, entered, December 1st, 2004 and the Supreme Court of Ohio Entry Denying Petitioners Motion for Reconsideration entered December 28th, 2004.

JURISDICTION

The Judgment of the First District Court of Appeals of Ohio was entered July 7th, 2004, the Supreme Court of Ohio denied jurisdiction December 1st, 2004. A Petition for Reconsideration was denied December 28th, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

A Motion to Extend Time to file a Petition for Writ of Certiorari was granted by this Court April 6th, 2005, extending the time to file a Writ of Certiorari until May 27th, 2005. (The Jurisdiction of this Court rests on 28 U.S.C. 1257(a).

Further, 28 U.S.C. §2403(b) may apply, this document shall be served on the Attorney General of the State of Ohio, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215.

STATUTE INVOLVED

§ 2925.43. Civil forfeiture action prior to prosecution

(A) The following property is subject to forfeiture to the state

in a civil action as described in division (E) of this section, and no person has any right, title, or interest in the following property:

(1) Any property that constitutes, or is derived directly or indirectly from, any proceeds that a person obtained directly or indirectly from the commission of an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense or that, upon the filing of a complaint, indictment, or information, could be the basis for finding a juvenile to be a delinquent child for committing an act that, if committed by an adult, would be a felony drug abuse offense;

(2) Any property that was used or intended to be used in any manner to commit, or to facilitate the commission of, an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense or that, upon the filing of a complaint, indictment, or information, could be the basis for finding a juvenile to be a delinquent child for committing an act that, if committed by an adult, would be a felony drug abuse offense.

. . .

(C) (1) Any property that is subject to civil forfeiture under this section may be seized by a law enforcement officer upon process, or a warrant as described in division (C)(2) of this section, issued by a court of common pleas that has jurisdiction over the property. Additionally, a seizure of the property, without process or a warrant being so issued, may be made by a law enforcement officer when any of the following applies:

(a) The seizure is incident to an arrest, a search under a search warrant, a lawful search without a search warrant, or

an inspection under an administrative inspection warrant.

(b) The property is the subject of a prior judgment in favor of the state in a restraining order, injunction, or other preservation order proceeding under section 2925.42 of the Revised Code, or is the subject of a forfeiture order issued pursuant to that section.

(c) The law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to the public health or safety.

(d) The initial intrusion by the law enforcement officer afforded the officer with plain view of personal property that is subject to civil forfeiture in a civil action under this section, the initial intrusion by the law enforcement officer was lawful, the discovery of the personal property by the law enforcement officer was inadvertent, and the incriminating nature of the personal property was immediately apparent to the law enforcement officer.

(2) For purposes of division (C)(1) of this section, the state may request a court of common pleas to issue a warrant that authorizes the seizure of property that is subject to civil forfeiture under this section, in the same manner as provided in Criminal Rule 41 and Chapter 2933. of the Revised Code for the issuance of a search warrant. Additionally, for purposes of division (C)(1) of this section, any proceeding before a court of common pleas that involves a request for the issuance of process, or a warrant as described in this division, authorizing the seizure of any property that is subject to civil forfeiture under this section shall be recorded by shorthand, by stenotype, or by any other mechanical, electronic, or video recording device. The recording of and any transcript of the recording of such a proceeding shall not be a public record

for purposes of section 149.43 of the Revised Code until the property has been seized pursuant to the process or warrant. This division shall not be construed as requiring, authorizing, or permitting, and does not require, authorize, or permit, the making available for inspection, or the copying, under section 149.43 of the Revised Code of any confidential law enforcement investigatory record or trial preparation record, as defined in that section.

. . .

(E)(4) A hearing shall be held in the civil action described in division (E)(1) of this section at least thirty days after the final publication of notice as required by division (E)(2) of this section and after the date of completion of the service of notice by personal service or certified mail, return receipt requested, as required by that division. Following the hearing, the court shall issue the requested order of civil forfeiture if the court determines that the prosecuting attorney has proven, by clear and convincing evidence, that the property in question is property as described in division (A)(1) or (2) of this section, and if the court has disposed of all petitions filed under division (E)(3) of this section or no petitions have been so filed and the time for filing them has expired. An order of civil forfeiture so issued shall state that all right, title, and interest in the property in question of the adult or juvenile who committed the act that is the basis of the order, is forfeited to the state and shall make due provision for the right, title, or interest in that property of any other person in accordance with any determinations made by the court under division (E)(3) of this section and in accordance with divisions (F)(5)(b) and (G)(2) of section 2925.42 of the Revised Code

STATEMENT

Forfeiture proceedings serve a valid and just purpose[1] when properly applied in the Criminal Justice System. The shifting of burdens between the Petitioner, the State, and the innocent owner known as, "The Mathews's Test"[2], although sometimes criticized, works to achieve its purpose of balancing the interests of the State and the individual.[3] That may be well and good, but it is of utmost importance that the Petitioner, the State, follow the law as written to avoid due process violations and the occasional improper taking.

It is well established that the State must meet its burden under The Mathews Tests to determine when the seized property is subject to forfeiture.[4] At a forfeiture hearing, the Government must show probable cause that the property has been used for narcotics trafficking.[5] If the Government meets this burden, the property is then subject to forfeiture and a warrant in remittance will be issued.[6]

Whatever the standard imposed, it has always been the State's burden to prove a connection to a crime to subject any property to forfeiture. Under the Comprehensive Drug Abuse Prevention and Control Act ("Drug Control Act") 21 U.S.C. §801-969 (1982) the burden was probable cause. The

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[1] *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 607-08 (1974)

[2] *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976)

[3] Due process implications shifting the burden of proof in forfeiture proceedings arising out of illegal drug transactions (1984) *Duke L.J.* 822, 841 (1984)

[4] *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492, 498, 500-04 (1993)

[5] *Milbrand*, 58 F3d 844

[6] *U.S. v. One Parcel of Property*, 95-6105 (2nd Cir.) (1996)

Government must first show that it has probable cause to believe the items of property are proceeds of an illegal drug exchange.[7] In some cases, the Court determined that the State had to prove a "Substantial Connection" between the suspected property and the criminal exchange.[8] Once the Government establishes their burden, probable cause under the Drug Control Act, for Civil Forfeiture the burden of proof shifts to the Claimant.[9]

ARGUMENT

The problem in the case at bar is two fold. First, the Court of Common Pleas Magistrate was under the impression that the State had already carried its burden, which, under the Ohio Revised Code Section §2925.43(e)(4) clearly states: "Clear & Convincing Evidence".[10] Second, that absent a Court's finding of property being subject to forfeiture, no petition for forfeiture may be brought. When property is "seized property" being held as evidence, it should be returned to its owner after trial, unless the State can prove by clear and convincing evidence that the subject property is contraband subject to forfeiture.[11]

U.S. Currency is not in and of itself contraband. Contraband is described in two parts under O.R.C. 2901.01(M) as:

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[7] *U.S. v. $2,500.00*, 689 F2d 10, 12 (2nd Cir. 1982) Cert. Denied 104 S. Ct. 1591 (1984)

[8] *U.S. v. $364,960.00*, 661 F2d 319, 323 (5th Cir. 1981)

[9] *U.S. v. Cleckler*, 270 F3d 1331 (11th Cir. 2001)

[10] Transcript of Proceeding (p. 35-36)

[11] *State v. Roberts*, 657 N.E.2d 547, 1020 App.3d 514, 518 (9th Dist. Ct. App. 1995)

"(1) Property that in and of itself is unlawful for a person to acquire or possess;

(2) Property that is not in and of itself unlawful for a person to acquire or possess, but has been *determined by a Court* of this State, in accordance with law, to be contraband because of its use in an unlawful activity or manner, of its nature, or of the circumstances of the person who acquires or possesses it;

. . .

(5) Any *** money *** that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in violation of, Chapter 2925 or 3719 of the Revised Code [Prohibiting drug offenses and regulating controlled substances, respectively];[12]"

In this case, the State carried no burden, as it was assumed, because of the label placed on the currency by the seizing officer, that the property was contraband subject to forfeiture.

A label, alone, will not carry the Burden of Proof for the State. The Ohio Supreme Court has held that an Officer's determination of a dog as vicious is insufficient to determine the dog's disposition prior to being put down, and further was unconstitutional.[13]

Previously, the Ohio Supreme Court has stated that

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[12] Ohio Revised Code, Section 2901.01(M)

[13] *State v. Cowan*, 103 Ohio State 3d 144 (2004)

> "[D]ue process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the Tribunal which pronounces judgment upon a question of life, liberty or *property*, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the questions of right in the matter involved. **If any question of fact or liability be conclusively presumed against him, such is not due process of law."**[14] (Emphasis supplied)

This case's record is bare, both in the underlying criminal prosecution of Petitioner's son-in-law and in the Civil Forfeiture hearing of any determination by the Court that this currency is either contraband or subject to forfeiture.

Ohio law is clear on its face when property is contraband.[15] It is clear upon the burdens of the parties claiming rights to allegedly contraband property and it is clear what must be done before the State may forfeit property subject to forfeiture.[16] If any questions arise in the facts presented to the Court, it is in the Court's obligation to deny the forfeiture. Forfeitures are not favored in law or in equity.[17] Statutes imposing forfeiture must be strictly construed; where possible, forfeiture should be **avoided**.[18] In a forfeiture proceeding, the State bears the burden by clear

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[14] *Williams v. Dollison*, 62 Ohio State 2d 297, 299 (1980)
[15] O.R.C. 2901.01(M)
[16] O.R.C. 2925.43
[17] *State v. Lilliock*, 70 O.S.2d 23, 25 (1982)
[18] *Id.*@ 26

and convincing evidence that the property in question is property as described in Division (A)(1) or (2) of Ohio Revised Code §2925.43.[19] The law does not favor forfeiture.[20]

It seems apparent here that the State clearly favored forfeiture. They are the ultimate beneficiaries of the process. The Constitution is to protect the citizens of the United States, to afford them certain rights. Due process seeks to prevent the government from arbitrarily depriving a person of his property. While considering the constitutionality of a Statute allowing the State to deprive a person of property, the source of procedural rules that comport with due process requirements is irrelevant. In such cases, the critical factor is the existence, or non-existence, of constitutionally sufficient procedural-rules which *must* be utilized.[21]

The possession of cash is not unlawful.[22] To demonstrate that cash is contraband, the State must show "that it is more probable than not, from all the circumstances, that the defendant used the items in the commission of criminal offenses."[23]

The only testimony offered, allegedly, linking the money to drug trafficking was by an Officer Pettis of the Cincinnati Police Department. The Transcript reads in part (p. 7)

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[19] O.R.C. 2925.43(4)

[20] *State v. Hill*, 70 Ohio St. 3d 25, 31 (1944)

[21] *Sensenbrenner, May, Appellee v. Crosby Appellant*, 37 Ohio St. 2d 43, 45 (1974).

[22] Lilliock @ 27

[23] *State v. Golston*, 66 O. App. 3d 423, 432 (1990)

> Off. Pettis: At any rate, I asked both of them in the presence of other officers were there any large sums of money in the house? They both told me no. (Asking Petitioner and his wife)
>
> . . .
>
> So we were led to believe that the money was in their house without their knowledge.
>
> . . .
>
> That's what led me to believe that the money belonged to Mr. Muthama , (Defendant in the criminal proceedings) that it was proceeds of drug trafficking.

No other evidence was ever produced to link this currency to a crime. No tests were run to determine whether there was drug residue on the money, no corroborating testimony of other officers was ever presented, no warrant was ever produced by the State claiming said property was subject to forfeiture. In fact, the only other officer to testify was Officer Timothy Slade who knew nothing about the money or the facts underlying the arrest. He simply held Mr. Muthama, the Defendant, during the search. There were no admissions or affirmative evidence linking the currency to a crime. The Court, however, still placed the burden upon the Petitioner to prove this currency was not contraband.

Petitioner, Mr. Smith, who has no criminal record, files tax returns, and is gainfully employed as a vender of hats, t-shirts and music, testified this was his life savings and he kept it at home because he did not trust banks. All the State had to do was find one bank account in Mr. Smith's name on it and his credibility would be shaken. In this case, that was not done and the Magistrate simply found him to be a non-credible witness, thereby giving his money to the State.

The Magistrate clearly erred and the Appellate Courts of Ohio improperly applied the law and defiled Petitioner's due process protections. Ohio Law in fact disapproves of forfeiture. "This Court must construe O.R.C. 2933.41 strictly, keeping in mind the principals of forfeiture are not favored in law or in equity"[24]

This accords with the general principal that Statutes imposing restrictions upon the use of private property in derogation of private property rights must be strictly construed.[25] Wherever possible, such statutes must be construed so as to avoid a forfeiture of property.[26] No forfeiture may be ordered unless the expression of the law is clear and the intent of the Legislature manifest.[27],[28]

Ohio Revised Code Section 2925.43 places the burden upon the prosecution to prove by clear and convincing evidence that the property is subject to forfeiture. Each judicial body from the Common Pleas Magistrate to the Common Pleas Judge and the First District Court of Appeals opined differently as to why the currency is subject to forfeiture but, at no time prior to the prosecution's Motion for Forfeiture, did any Court rule that the currency was subject to forfeiture.

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[24] *State ex rel Lukens v. Industrial Commission*, 143 O.S. 609, 611 (1944)

[25] *State ex rel Cline v. Industrial Commission*, 136 O.S. 33,35 (1939)

[26] 24 Ohio Jurisprudence 2d 524, Forfeitures, Section 4;37

[27] Corpus Juris Secundum 8-9, Forfeitures, Section 4

[28] *Saunders v. Zoning Dept.*, 66 Ohio St. 2d 259, 261 (1981) Citing *Perkins v. Hattery*, 106 Ohio App. 361, 365 (1958)

Although the original petition filed by the State cites O.R.C. 2925.43(E)(1) as its basis for forfeitures , the Magistrate's Decision clearly cites 2925.42(F)(4) as his basis in denying return of the seized goods. Such blatant disregard for the formalities of forfeiture again clearly deprive Petitioner of his due process rights. The Court erred to the prejudice of Petitioner and the Appellate and Supreme Courts affirmed the erroneous decision.

The Court of Common Pleas Judge next decided again, under the wrong Code Section, O.R.C. 2925.42(F)(5), Note Magistrate's Decision cites Section (F)(4), that Officer Pettis' testimony was sufficient to deprive Petitioner of his life savings despite the clear appeal that the Petition was brought under 2925.43(E)(1). The Common Pleas Judge that decided this appeal was also the Judge who accepted the plea of Defendant Kenneth Muthama and failed to determine the currency was subject to forfeiture prior to the State's Motion for Forfeiture.

The First District Court of Appeals, while not mentioning the key element of O.R.C. 2925.43, that being Section (E)(4), the Prosecutor's burden, clearly overlooks the two prior Decisions citing the wrong Code Sections. The Court of Appeals, on page 4, of the Decision, finally concedes that the Prosecution bears a burden but words the Decision awkwardly compared to the Code, the Court states

> "Once the Court disposes of the petition, the Court must issue the order of civil forfeiture if it determines that the State has proven by clear and convincing evidence that the property in question is property as described in O.R.C. 2925.43(A)".

Referring again to the Transcript of Proceedings, only one officer testified that she asked Petitioner if there were large sums of money in the house. The alleged lack of candor of the Petitioner does not make him a drug dealer or tie him to a drug transaction. Further, no drug transaction ever took place upon the property known as 4027 Delaney Street and, further, no search warrant was ever produced at the criminal proceedings of the Defendant Muthama or the Civil Forfeiture Proceedings. This resembles a "smash and grab" policy by the Cincinnati Police Department to take any money found in any proximity to a criminal defendant. The State did not attempt forfeiture of the house, though property in the house, based solely on one officer's testimony is now subject to forfeiture. There is no Order of the Court permitting forfeiture and no search warrant. Further, the State got to pass on its burden clearly delineated under the Statute.

CONCLUSION

The Law of the State of Ohio sets forth six steps to a constitutionally valid forfeiture. (Step One): Pursuant to O.R.C. §2925.43(C)(1) any property that is subject to forfeiture under this Section [that being described in §2925.43(A)(1) & (2)] may be seized by a law enforcement officer upon process, or a warrant as described in division (C)(2) of this Section, issued by a Court of Common Pleas that has jurisdiction over the property. This "warrant" is separate and apart from any general search warrant and **must be**; before a Court of Common Pleas that involves a request for the issuance of process, or a warrant, as described in this Division authorizing the seizure of any property subject to civil forfeiture, it must be recorded by shorthand, by steno type or by any other mechanical, electronic or video

recording device."[29] As stated previously, no Court ever issued, and no Prosecutor or police officer ever produced a warrant requesting seizure of property subject to forfeiture. (Step Two) If the prosecution convinces the Court that the property is subject to forfeiture a writ or warrant shall issue to seize said property. (Step Three) The writ or warrant is executed along with the search warrant and the property is seized. (Step Four) The prosecution files a motion for forfeiture based upon the writ or warrant inclusive of issuing service by publication or otherwise. (Step Five) A hearing is held where the prosecution has the burden by clear and convincing evidence to show the property is subject to forfeiture as set forth in O.R.C. §2925.43(A)(1) & (2). At this hearing "innocent owners" may come forward and make a claim to the property;

And finally (Step Six) Following the hearing the Court shall issue the requested Order of Civil Forfeiture if the Court determines that the prosecuting attorney has proven by clear and convincing evidence that the property in question is property as described in Division (A)(1) and (2) of this Section and if the Court has disposed of all petitions filed under Division (E)(3) of this Section.

The State failed to comply with Step One: no hearing for a warrant of seizure ever took place; it failed to comply with Step Two: No warrant for seizure of contraband property was ever issued; Step Three: it is apparent if no writ or warrant for seizure ever issued no writ or warrant could be exercised.

The State then complied with Step Four and filed a Motion for Forfeiture of Property wrongfully seized; and a

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[29] O.R.C. 2925.43(C)(2)

hearing was conducted in accordance with Step Five. However, the Magistrate clearly placed the burden upon the "innocent owner" to prove that the property was not contraband subject to forfeiture instead of properly placing the burden upon the State to prove the property was contraband subject to forfeiture. The Court and prosecutor clearly misread the law.

The Court:

"I thought the Court of Appeals has told us that in claims like this, the burden shifts to the innocent owner. Is that ... am I stating that accurately, Mr. Waters? . . ."

Mr. Waters:

That's correct, your Honor. In that case the burden shifts. They've got to show they've got standing to contest the forfeiture . . . ." (Transcript p. 35)

Again, it is obvious Step Six was done properly or this issue would not be in front of this Court today. It is imperative this matter be granted *certiori* so that the State of Ohio is not allowed to abrogate its own Statute and unlawfully forfeit personal property of either criminal defendants or innocent owners. To skip half of the procedure for forfeiture and contort the remaining procedure is unacceptable. The cavalier attitude of the prosecution must not be tolerated and their theft by deception cannot be condoned or thought to be Constitutional.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

No. 1404

[Filed, December 28, 2004]

In Re: $22,161.00 United States Currency	)
Gregory Smith, Appellant.	)

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be and hereby is, denied.

(Hamilton County Court of Appeals; No. C030767)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

THE SUPREME COURT OF OHIO

No. 1404

[Filed, December 1, 2004]

In Re: $22,161.00 United States Currency	)
Gregory Smith, Appellant.	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C030767)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-030767
Trial No. M-030095

[July 7, 2004]

In re: $22,161.00 United States Currency Seized from Kenneth Muthama

JUDGMENT ENTRY

This appeal is considered on the accelerated calendar reader App.R. 11.1(E) and Loc.R. 12, and this Judgment Entry shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3.

The state of Ohio filed a civil forfeiture action, pursuant to R.C. 2925.43, to claim $22,161.00 that had been seized by Cincinnati police officers during the execution of a search warrant at the home of Kenneth Muthama, a drug dealer. Muthama lived at the home with his stepfather, Gregory Smith, and his mother, Karen Wuambua. Smith claimed that

the seized money was his and opposed the state's forfeiture petition.

At the hearing on the forfeiture action before a magistrate of the common pleas court, Cincinnati Police Officer Danita Pettis testified that, while working as an undercover officer, she had purchased crack cocaine from Muthama on three separate occasions. Each time, Muthama had left his home with the crack cocaine, made the sale to Officer Pettis, and re-entered his home. At one point, Muthama told Officer Pettis that he could obtain a "kilo" of cocaine for her for $25,000.

Following the last drug transaction, police arrested Muthama and charged him with multiple felony drug offenses. Following his arrest, the police executed a search warrant at Muthama's home. During their search, officers recovered seventeen grams of crack cocaine from a sock that was in a dresser drawer. The officers also recovered eighteen grams of marijuana and $22,161 from a locked box that was in an unlocked closet in another room.

The police found no documents or receipts with the money. Following the recovery of the money, Officer Pettis twice asked Smith and Wuambua whether there was any large sum of money or contraband in the home. Each time, the couple denied that there was.

Muthama testified that he was serving a prison term for drug trafficking. He said that, at the time of his arrest, he had been supporting himself by selling crack cocaine.

Muthama admitted that he had not been employed at the time. Muthama denied that he had told Officer Pettis that he would arrange to sell her a kilo of crack cocaine, but admitted that he had probably quoted her a price of $25,000. When

asked how he knew a kilo sold for $25,000, Muthama responded, "It don't sell for twenty-five. * * * It more than that." Muthama claimed that he knew nothing about the money that the police had seized from his home, and he also insisted that the money recovered by the police was not his.

Smith testified that he owned the home and that he had lived there for fourteen years. Smith said that he was employed as a licensed vendor and that the seized money was his life savings. Smith said that he locked his money in his closet with marijuana that he kept for his own use. Smith claimed that he locked up his money because he did not trust banks and because there were "teenagers in the house." Smith testified that he did not recall telling Officer Pettis that there were no large sums of money in the house. Wuambua testified that she and Smith had separate closets, and that both closets had deadbolt locks on them.

Following the forfeiture hearing, the magistrate ordered the seized money forfeited to the state. Over Smith's objections, the trial court affirmed the magistrate's decision.

In his first assignment, of error, Smith now argues that the trial court erred by assuming that the state had proved that the seized money was contraband under R.C. 2933.43. But the state did not bring the action under R.C. 2933.43. The state properly brought the action under R.C. 2925.43, which specifically pertains to felony drug-abuse offenses. Moreover, R.C. 2925.43 expressly provides that the provisions of R.C. 2933.43 relating to the procedures for the forfeiture of contraband do not apply to a civil action to obtain a civil forfeiture under R.C. 2925.43.[1]

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[1] R.C. 2925.43(B)(2)

Smith also argues that the trial court improperly placed the burden upon him to demonstrate that he had a legal right to the seized money. We disagree. R.C. 2925.43(A) provides, "The following property is subject to forfeiture to the state in a civil action as described in division (E) of this section, and no person has any fight, title, or interest in the following property:

"(1) Any property that constitutes, or is derived directly or indirectly from, any proceeds that a person obtained directly or indirectly from the commission of an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense * * *"

"(2) Any property that was used or intended to be used in any manner to commit, or to facilitate the commission of, an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense * * *."

Under R.C. 2925.4303)(1), "All right, title, and interest in property described in division (A) of this section shall vest in the state upon the commission of the-act giving rise to a civil forfeiture under this section."

Following a prosecutor's commencement of an action under R.C. 2925.43(E)(1), a third party, other than the adult who committed the act that could be the basis of an order of civil forfeiture, who claims any right, title, or interest in the seized property may petition the court for a hearing to adjudicate the validity of the person's alleged right, title, or interest in the property.[2] At the hearing, "the petitioner may

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[2] See R.C. 2925.43(E)(3) and 2925.42(F)(3)(a).

testify, present evidence and witnesses on the petitioner's behalf, and cross-examine witnesses for the state. The state may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses for the petitioner.'"[3]

The court may not issue an order of civil forfeiture if it determines that the third-party petitioner has established by a preponderance of the evidence that the petitioner, rather than the adult who committed the felony drug-abuse act, has a legal right, title, or interest in the property. Once the court disposes of the petition, the court must issue the order of civil forfeiture if it determines that the state has proved by clear and convincing evidence that the property in question is property as described in R.C. 2925.43(A).[4]

In this case, the magistrate noted that he had given Smith ample time following the hearing to produce receipts, business records, or other documentation to demonstrate that he the seized money was his, but that Smith had failed to do so. The magistrate also commented upon the discrepancies between the officer's testimony and Smith's testimony, and concluded that Smith was not a credible witness.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact.[5] Where the magistrate found Smith's explanation regarding the seized money to be unbelievable, the magistrate properly found that

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[3] R.C. 2925.42(F)(4)

[4]R.C. 2925.43(E)(4)

[5] See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

Smith had failed to demonstrate by a preponderance of the evidence that he had a legal right to the money. Moreover, there was some competent, credible evidence in the record to support the trial court's judgment.[6] Accordingly we overrule Smith's first assignment of error.

In his second assignment of error, Smith argues that the trial court erred by granting the state's request for civil forfeiture because the court failed to follow the procedures set forth in R.C. 2925.43 . Smith Contends specifically that the state "unreasonably delayed the filing of a petition for forfeiture." Smith failed to raise this issue in the trial court, and he thereby has waived the issue on appeal.[7]

Next, Smith points out that while the state had notified Muthama of the forfeiture action, it had failed to give him notice of the action as required by R.C. 2925.43(E)(2). But Smith cannot claim that he was not on notice of the action, because he filed a response to the state's complaint within eight days of its filing. Moreover, Smith cannot demonstrate that he was prejudiced in any way, because he was accorded a hearing on his petition as provided by R.C. 2925.43(E), and was allowed to submit numerous exhibits following the hearing by agreement of the state. Therefore, we overrule Smith's second assignment of error and affirm the judgment of the trial court.

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[6]*Seasons Coal v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

[7]See, e.g., *State v. Peagler* 76. Ohio St 3d 496, 499, 1996-Ohio-73,668 N.E.2d 489.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

WINKLER, P.J., GORMAN and SUNDERMAN, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 7, 2004 per order or the Court

/s/_____
Presiding Judge

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. M030095

[September 18, 2003]

In re: $22,161.00 United States Currency Seized from Kenneth Muthama	)

MEMORANDUM OF DECISION AND ORDER

This case came before the Court on Petitioner Gregory Smith ("Petitioner's") Objections to the Magistrate's Decision. Petitioner objects to the Magistrate's ruling that that burden was upon Petitioner to prove innocent ownership of the Twenty Two Thousand One Hundred Sixty One Dollars ($22,161.00) ("Money") at issue in this case.

Officer Pettis ("Pettis") of the Cincinnati Police Division was involved in numerous drug transactions with one Kenneth Muthama ("Muthama"). As a result of those transactions, Pettis obtained a search warrant for Muthama's residence. The location of Muthama's residence was ascertained based upon the fact that he was observed leaving said residence just prior to each transaction with Pettis. The search warrant on

that residence netted the Money. Pettis testified that he had spoken with the Petitioner before the search and inquired as to whether or not there were any significant sums of money in the residence. Petitioner replied in the negative, yet the Money was found inside a small box containing marijuana, that was also seized, as a part of the search. No tax returns or receipts were brought before the Magistrate or placed into evidence regarding Petitioner's earnings, in order to support his claim of innocent ownership.

On May 27th, 2003, the Magistrate found that Petitioner, as an alleged innocent owner, had the burden of proof, by the preponderance of the evidence, to ownership," pursuant to **R.C. § 2925.42(F)(5) and (1999)** ***State v. In Re: 1988 Lincoln Town Car,*** **WL 181202, * 2 (Ohio App. 5th Dist.).** Petitioner must establish a legal right, title, or interest in the property by a preponderance of the evidence. **R.C. §2925.42(F)(5).**

Based upon the want of documentary evidence for his business, in addition to the discrepancies between he and the Officer's testimony, the Magistrate found that Petitioner was not a credible witness and therefore, had not satisfied the burden of proof.

This Court finds that Petitioner's objections must be overruled. The Magistrate heard Petitioner's and Pettis' testimony, and had the opportunity to observe their demeanor while testifying. Pettis testified that Petitioner, before the Money was recovered, stated that he was unaware of any significant sums of money in the residence. Petitioner offered no evidence regarding the source of the Money, and stated that he was unaware of its presence in the residence. Thus, Petitioner failed to satisfy the applicable burden of proof.

Petitioner's Objections to the Magistrate's Decision are hereby OVERRULED, and the Magistrate's decision is hereby affirmed.

BE IT SO ORDERED.

DATE: 9-17-03

/s/ John Andrew West
Judge John Andrew West

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. M030095

[May 27, 2003]

In re: $22,161.00 United States Currency Seized from Kenneth Muthama	)

MAGISTRATE'S DECISION

This case is a civil forfeiture action filed under O.R.C § 2925.43. Trial of this case occurred on *multiple* days, and was finally taken under *submission* on April 7, 2003.

This case arises out of a seizure of property by the Cincinnati Police Division on September 4, 2002. Officer Pettis of the Cincinnati Police Division was involved in multiple drug transactions with defendant Kenneth Muthama ("Muthama") whereby Pettis purchased marijuana, and crack from Muthama with marked bills. The last transaction involved the sale of a kilo of cocaine after which Muthama was arrested and a search warrant was obtained for his residence based on the fact that he was observed leaving from there each time just prior to making a transaction with the

officer. The search warrant on his home netted an additional 17 grams of crack, 18 grams of marijuana and the $22,161.00 which is the subject of this innocent owner claim.

Officer Pettis testified that he spoke with Gregory Smith, the alleged innocent owner and Karen Waumba. Pettis testified that he asked both Smith, and Waumba: if there was any contraband, or any significant sums of money in the residence. Both replied in the negative on two separate occasions. Waumba and Smith are Muthama's mother and step-father. The money, $22,160.00, was found inside of a small box along with the marijuana that was also seized as a part of the warrant-authorized search. No documents or receipts were found with the money. The shoe box was located in a clothes closet in the bedroom. None of the money contained in the seized box was marked money that had been used by the Cincinnati Police Division to purchase drugs. Further, monies and marijuana that were found in the closet were not in the same room as the crack cocaine that had been located in Muthama's bedroom. That crack cocaine was found based on Kenneth Mathama's explicit direction to the officers searching the residence. It is the contention of the State that the seized cash belonged to Muthama, and was proceeds of drug trafficking.

Testimony was then taken from the defendant, Kenneth Muthama. He stated that $22,160.00 in question was not his, and that the only thing that he knew about the money was that it was recovered from the Delaney Street residence, where his mother and step-father reside. Muthama further *stated* that he knew that Smith kept his money in his closet in his bedroom.

The movant in this innocent owner claim, Kenneth Smith, then testified as to his knowledge of the origin of the money in the shoe box located as a part of the search of the

residence. He stated that he lived at 4027 Delaney and that he owned the real estate. Further, he stated that he was licensed and employed as a vendor, selling CDs, DVDs, and baseball caps. As a part of the normal course of running that business, all transactions were carried out in cash or credit card, never a check, as Smith does not have a bank account. Smith testified that he had always kept his money in his home because of an inherent distrust of banking institutions. He stated that when he would work, he would get money, which he would then secure with rubber bands and put into his box for safe keeping. Another rationale Smith gave for locking his money up was due to the teenagers living in his home. Smith noted that the marijuana found in the shoe box with the money was his, for his own personal use. He explained that he did not recall Officer Pettis or may other law enforcement officer asking if there were any large sums of money in the home. The court then heard testimony from Smith as to his history regarding the filing or lack of filing of income tax returns. No tax returns or receipts were brought before the court or placed into evidence. Smith finally testified that the $22,000 was a culmination of years of earnings, his life savings.

Muthama's mother, Karen Wauambua, testified that while she did live at the Delaney residence, she did not have access to his locked closet where the money was kept. She further stated that she too has a dead-bolted closet in which she keeps her private items locked. Smith does not have a key to her closet either.

On re-examination, Officer Pettis testified that the closet from which the $22,160.00 was recovered was not a locked closet. This is a discrepancy with the testimony of Smith, who stated that the money was discovered in a locked closet. See Tr. pp. 22.

Muthama was convicted, and is currently serving a one year sentence for drug trafficking in the Ohio Department of Corrections.

At the hearing, the petitioner (innocent owner) may testify, present evidence and witnesses on the petitioner's behalf, and cross-examine witnesses for the state. The state may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross examine witnesses for the petitioner. In addition to evidence and testimony presented at the hearing, the court shall consider the relevant portions of the record in the felony drug abuse offense or delinquent child case that resulted in the order of forfeiture. See R.C.2925.42(F)(4).

The statute further provides:

> that the court Shall amend its order of forfeiture in accordance with its determination if it determines, at the hearing, that the petitioner has established either of the following by a preponderance of the evidence: (i) The petitioner has a legal right, title, or interest in the property that renders the order of forfeiture completely or partially invalid because it was vested in the petitioner, rather than the adult offender whose conviction or guilty plea or the delinquent child whose adjudication is the basis of the order, or was superior to any right, title, or interest of that offender, at the time of the commission of the felony drug abuse offense or act that is the basis of the order. R.C. §2925.42(F)(5)(a)(I).

Further, the burden of proof is on the owner, by a preponderance of the evidence, to prove "innocent ownership". R.C. § 2925.42 (F)(5). See also *State v. In Re."*

1988 Lincoln Town Car, 1999 Ohio App. LEXIS 1527, at * 5 (March, 16, 1999, 5th Ct. App.).

At the hearing, the court gave the movant, Smith, ample time to procure evidence and documents, as he bears the burden of proof. While he did produce photos of the areas at issue, namely, the closets and locked boxes, he was unable or unwilling to produce any receipts, or business records which would have proven a legitimate origin for the large sum of cash found in his residence. One 2002 Federal income Tax Return was produced Which listed a $5864 business income for the year 2001. Based on this dearth of documentary evidence for his business, and coupled with the discrepancy between the testimony of the officer, and the testimony of Smith as to where the cash was located, this court finds that Smith is not a credible witness. As such he has not met his burden of proof and is unable to prove to the court that he is an innocent owner.

DECISION

The property will be forfeited.

/s/_____
RICHARD A. BERNAT
MAGISTRATE
COURT OF COMMON PLEAS

Copies sent by Clerk of Courts to:

Mark G. Waters, Esq.
Assistant Prosecuting Attorney
Hamilton County Prosecutor's Office
230 E. Ninth St., Ste. 4000
Cincinnati, OH 45202

A. Brian McIntosh
15 E. 8th St., Suite 300 W
Cincinnati, Ohio 45202

NOTICE

Objections to the Magistrate's Decision must be filed Within fourteen days of the filing date of the Magistrate's Decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 5-28-03 Deputy Clerk _____

Supreme Court, U.S.
FILED
JUN 29 2005
OFFICE OF THE CLERK

No. 04-1613

In the Supreme Court of the United States

IN RE: $22,161.00 UNITED STATES CURRENCY
SEIZED FROM KENNETH MUTHAMA [GREGORY SMITH]
Petitioner,

v.

THE STATE OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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HAMILTON COUNTY PROSECUTING ATTORNEY

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QUESTIONS PRESENTED

1. Where a Civil Forfeiture Petition Is Filed Under Ohio Revised Code 2925.43, and All Proper Parties Are Notified, and an Innocent Ownership Hearing Is Conducted, and the Trial Court Finds the Property Should Be Forfeited, the State Has Met its Burden Under R.C. 2925.43(E)(4).

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The December 28, 2004 order by the Ohio Supreme Court denying reconsideration.

The opinion of the Ohio Supreme Court released December 1, 2004 denying jurisdiction to hear the case and dismissing the appeal as not involving any substantial constitutional question.

The July 7, 2004, decision of the First District Court of Appeals upholding the decision of the trial court.

The September 18, 2003 decision by the Hamilton County Trial Court affirming the decision of the Magistrate.

The May 27, 2003 Magistrate's decision denying Smith's claim that he is an innocent owner, and forfeiting the property involved.

JURISDICTIONAL STATEMENT

Petitioner claims jurisdiction in this Court pursuant to 28 U.S.C. § 1257(a).

STATUTE INVOLVED

Ohio Revised Code § 2925.43. [See Petitioner's Petition For Writ of Certiorari, pp. 1-4]

STATEMENT OF THE CASE

On January 23, 2003, the State of Ohio filed a Petition for Forfeiture for $22,161.00 in U.S. currency.

On May 27, 2003, after a full hearing, Magistrate Bernat found the $22,161.00 should be forfeited to the State of Ohio; that Gregory Smith failed to prove an innocent owner claim for the money. On September 18, 2003, the trial court affirmed the Magistrate's decision. On July 7, 2004, the First District Court of Appeals affirmed the trial courts decision. On December 1, 2004, the Ohio Supreme Court denied jurisdiction to hear the case. On December 28, 2004, the Ohio Supreme Court denied Smith's motion for reconsideration.

STATEMENT OF FACTS

Kenneth Muthama was selling and buying crack cocaine from undercover police officers. (T.p. 4) The officers involved conducted several drug transactions. (T.p. 4) Additional officers were posted at the 4026 Delaney residence to observe him coming and going. On September 3, 2002, Muthama was arrested. (T.p. 3) The residence at 4026 Delaney was the subject of a search warrant. (T.p. 6) Mr. Gregory Smith and Ms. Karen Wuambua are residents of 4026 Delaney. (T.p. 6) Kenneth Muthama was an unemployed, twenty-five year old supporting himself by selling drugs. (T.p. 13) Muthama was living at 4026 Delaney with his step-father Greg Smith and mother Karen Wuambua.(T.p. 30) Smith is a vendor. (T.p. 20) He sells CD's, DVD's, and ball caps. (T.p. 20) Smith does not trust banks. (T.p. 21) Smith testified that he had $22,161.00 locked in his bedroom. (T.p. 22) Smith testified that the eighteen grams of marijuana found with the cash was his. (T.p. 6)

Smith also testified that he and Muthama's mother take care of Muthama. (T.p. 25) The only tax return Smith could produce was for the year 2002 and listed a $5,864 business income for the year 2001. (T.p. 26) Karen Wuambua testified that she is a disabled veteran and draws disability pay. (T.p. 31)

Kenneth Muthama is currently serving a prison term for the felony drug trafficking conviction stemming from these facts.

Officer Pettis testified that when he found the marijuana and cash, the closet where it was located in was not locked. (T.p. 22)

In addition to the eighteen grams of marijuana found in the house, seventeen grams of crack cocaine was found in a dresser drawer inside a sock. (T.p. 8)

Finally, at the time the residence was searched, both Mr. Smith and Ms. Wuambua told Officer Pettis that no contraband or large sums of money were in the house. (T.p. 7)

REASON FOR DENYING THE WRIT

THE STATE PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE $22,161.00 WAS DERIVED DIRECTLY OR INDIRECTLY FROM PROCEEDS OBTAINED DIRECTLY OR INDIRECTLY FROM A FELONY DRUG OFFENSE.

Petitioner argues the State failed to meet its burden of proving by clear and convincing evidence, that the $22,161.00 did not constitute or was not derived directly or indirectly from proceeds that were obtained directly or indirectly from the commission of a felony drug offense.[1] Petitioner's Writ should be denied.

At trial, the State established that Kenneth Muthama was a drug dealer. Muthama had been involved in multiple drug transactions with the Cincinnati Police. After each transaction, Muthama went back to the Smith house. Muthama told an undercover police officer he could get a kilo of cocaine for $25,000. Smith and his wife, Karen Wuambua told police, no large sums of money were inside the house. The $22,161.00 was found in an unlocked closet and inside the box with the money was marijuana. Smith produced only one Federal Income Tax return showing $5,864.00 business income for the year 2001. Crack cocaine was also found inside the home. Kenneth Muthama lived in Smith's house.

This evidence was presented at trial to establish by clear and convincing evidence that the $22,161.00 was money derived either directly or indirectly from a felony drug

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[1] O.R.C. 2925.43(A)(1)

offense.[2] The State met its burden. The trial court properly found, based on this evidence, that the property should be forfeited.

CONCLUSION

The Ohio Supreme Court properly refused jurisdiction and reconsideration to hear this case. The First District Court of Appeals found the State had met its burden and affirmed the decision of the trial court. The issue raised in the Petition for Writ of Certiorari is not matter of great legal importance and there are no compelling reasons to grant the within Petition. The Writ of Certiorari should be denied.

Respectfully submitted,

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[2] O.R.C. 2925.43(E)(4)